TENAGA NASIONAL BHD v. IRHAM NIAGA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ALIZATUL KHAIR OSMAN JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-2339-10-2012]
21 JULY 2015

COMPANY LAW: *Separate legal entity – Lifting veil of incorporation – Arbitration award made against subsidiary company – Claim for payment of Arbitration award – Whether act of collapsing back an equitable or conscionable conduct – Whether act of collapsing back amounted to fraud in equity – Whether veil of incorporation should be lifted*

The appellant ('defendant') operated a single business unit and performed its functions through its various divisions. The defendant then decided to decentralise its various functions and incorporated several subsidiaries which included TNBT. TNBT entered into five lease and warehouse management agreements ('agreements') between the year 2001 and 2002 with the plaintiffs. In 2004, TNBT decided to terminate the agreements. The dispute was then referred to arbitration. After the final award was given by the arbitration, the plaintiffs found out that the defendant had declared that its financial performance would not be affected by the award as TNBT was a dormant company. The defendant then proceeded to 'collapse back' the functions of several of its subsidiaries, which included TNBT to itself. The plaintiffs then commenced proceedings against the defendant in the High Court for the payment of the arbitration award. The plaintiffs sought to lift the corporate veil of TNBT on the grounds that the defendant (i) was the entity having total control, direction and management of TNBT such that the defendant and TNBT were one and the same; and (ii) had committed fraud against the plaintiffs through the use of TNBT as the contracting vehicle for the agreements. The High Court Judge ('HCJ') found that this was a case of (i) special circumstances where there existed 'inequitable or unconscionable conduct amounting to fraud in equity' although not actual fraud; and (ii) it was inequitable and unconscionable for the defendant to have collapsed back the business of the TNBT. The HCJ thus lifted the corporate veil. Hence the present appeal.

Held (allowing appeal with costs; setting aside order of High Court)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The evidence was crystal clear that TNBT, which was formed long before the agreements were entered into, was not formed as a means to conceal the true facts in order to avoid contractual liability. The plaintiffs knew very well the true nature of TNBT and its mode of operations. Even if there was no collapsing back, there was always a danger that TNBT could be wound up and, being a company with no assets on its own, TNBT would be in no position to make any payments

to the plaintiffs or any other creditor. The agreements were pure commercial transactions between the parties. Therefore, there was no actual fraud involved in the present case. The plaintiff's pleaded case was clearly one of actual fraud. In the circumstances, the trial judge had erred in lifting the corporate veil on the ground of 'inequitable or unconscionable conduct amounting to fraud' when that was not the pleaded case of the plaintiffs. There was no basis for the corporate veil to be lifted. (paras 48-51, 56, 62 & 68)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') mengendalikan unit perniagaan tunggal dan melaksanakan fungsinya melalui pelbagai bahagiannya. Defendan kemudian memutuskan untuk mengagihkan fungsinya dan memperbadankan beberapa anak syarikat termasuk TNBT. TNBT memeterai lima perjanjian pajakan dan gudang pengurusan ('perjanjian') antara tahun 2001 dan 2002 dengan plaintif. Pada tahun 2004, TNBT memutuskan untuk menamatkan perjanjian tersebut. Pertikaian tersebut kemudiannya dirujuk kepada timbang tara. Selepas award akhir diberikan oleh timbang tara, plaintif mendapati bahawa defendan telah mengisytiharkan bahawa prestasi kewangannya tidak akan terjejas oleh award tersebut kerana TNBT adalah sebuah syarikat yang aktif. Defendan telah meneruskan untuk 'collapse back' fungsi beberapa anak syarikatnya, termasuk TNBT. Plaintif kemudiannya memulakan prosiding terhadap defendan di Mahkamah Tinggi bagi pembayaran award timbang tara. Plaintif mencuba menyingkap tirai korporat TNBT atas alasan bahawa defendan (i) adalah entiti yang mengawal, mengarah dan mengurus TNBT, oleh itu, defendan dan TNBT adalah satu dan sama; dan (ii) melakukan frod terhadap plaintif melalui penggunaan TNBT sebagai alat penjanji. Hakim Mahkamah Tinggi ('HMT') mendapati bahawa ini adalah kes di mana (i) wujudnya hal-hal keadaan istimewa 'tidak berekuiti atau tidak adil yang mengakibatkan frod di dalam ekuiti' walaupun frod tidak sebenar; dan (ii) adalah tidak berekuiti dan tidak adil bagi defendan 'collapse back' urusan TNBT. Justeru, HMT menyingkap tirai korporat. Oleh itu rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Keterangan adalah jelas bahawa TNBT, yang ditubuhkan lama sebelum perjanjian dibuat, tidak ditubuhkan sebagai satu cara untuk menyembunyikan fakta sebenar untuk mengelakkan liabiliti kontrak. Plaintif mempunyai pengetahuan sifat sebenar TNBT dan mod operasinya. Walaupun tidak ada 'collapse back', ada bahaya bahawa TNBT boleh digulungkan dan, oleh kerana sebuah syarikat yang tiada aset sendiri, TNBT akan berada dalam kedudukan untuk tidak membuat apa-apa bayaran kepada plaintif atau mana-mana pemiutang lain. Perjanjian adalah transaksi komersial tulen antara pihak-pihak. Oleh itu, tidak ada frod sebenar yang terlibat dalam kes ini. Kes yang diplidkan

plaintif adalah jelas suatu kes frod sebenar. Dalam keadaan ini, hakim bicara terkhilaf dalam menyingkap tabir korporat atas alasan 'tidak berekuiti atau tidak adil yang mengakibatkan frod di dalam ekuiti' apabila ini bukan kes yang diplid oleh plaintif. Tidak ada asas untuk menyingkap tirai korporat.

Case(s) referred to:

Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal [2013] 2 CLJ 734 CA ***(refd)***

Ben Hashem v. Al Shayif [2008] EWHC 2380 (Fam) ***(refd)***

Bousted Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Epic Quest Sdn Bhd & Anor v. Sheila Eleanor De Costa [2011] 8 CLJ 518 CA ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***

VTB Capital Plc v. Nutritek International Corp and Others [2012] 2 BCLC 437 ***(refd)***

Yap Sing Hock & Anor v. Public Prosecutor [1993] 1 BLJ 35 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 rr. 7, 8

For the appellant - Cecil Abraham, S Nantha Balan & Natalia Izra Nasaruddin; M/s Zul Rafique & Partners

For the respondents - Wong Chong Wah, Ghazi Ishak, Lim Koon Huan & Jason Teoh Choon Hui; M/s Skrine

[Editor's note: For the High Court judgment, please see Irham Niaga Sdn Bhd & Anor v. Tenaga Nasional Bhd [2010] 10 CLJ 178 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This was an appeal by Tenaga Nasional Berhad, who was the defendant in the High Court, against the decision of the High Court which allowed the claim by Irham Niaga Sdn Bhd and Irham Niaga Logistics Sdn Bhd, who were the plaintiffs in the High Court, for the payment of the arbitration award obtained by the respondents against a subsidiary of the appellant, TNB Transmission Network Sdn Bhd ("TNBT").

[2] The parties to this appeal shall be referred to as they were in the High Court.

Background Facts

[3] The defendant was (and still is) licensed under the Electricity Supply Act 1990 to supply electricity in Peninsular Malaysia.

[4] Prior to March 1996, the defendant operated as a single business unit, and performed its functions through its various divisions.

[5] In March 1996, the defendant decided to decentralise its various functions and incorporated several subsidiaries to perform the individual functions formerly performed by the various divisions. TNBT was one such subsidiary. It was incorporated on 11 May 1996. TNBT's main function was to manage the assets of the defendant in relation to the national transmissions network and its related activities. These assets included equipment such as transformers, switchgears, multicore cables, insulators, isolaters, and resisters.

[6] TNBT entered into five lease and warehouse management agreements ("agreements") with the plaintiffs on 13 November 2001, 28 February 2002, 26 June 2002, 02 July 2002 and 16 September 2002, respectively, for the storage of the equipment it managed. These comprised 6.83 acres of open yard and 12 acres of covered warehouse.

[7] TNBT decided to terminate the agreements in 2004.

[8] The dispute was referred to arbitration. By the time the matter went to arbitration, TNBT had paid a total of RM 79,086,843 in rentals and other payments to the plaintiffs.

[9] The final award was given on 3 October 2007 for the sum of RM106,888,499.34 for the first plaintiff and RM6,102,922.50 for the second plaintiff.

[10] The plaintiffs then found that the defendant had in various reports made to the stock exchange and financial analysts declared that its financial performance would not be affected by the award as TNBT was a dormant company.

[11] By this time, the defendant had proceeded to "collapse back" the functions of several of its subsidiaries, including TNBT, to itself. TNBT was thus left as a dormant company.

[12] The plaintiffs then commenced proceedings in the High Court against the defendant for the payment of the arbitration award.

In The High Court

[13] In the High Court, the plaintiffs' sought to lift the corporate veil of TNBT on two main grounds:

(a) the defendant was the entity having total control, direction and management of TNBT, or alternatively there was functional integrality between the defendant and TNBT such that the defendant and TNBT were one and the same;

(b) the defendant had committed fraud against the plaintiffs through the use of TNBT as the contracting vehicle for the agreements.

Submissions Of Parties In The High Court

[14] At the conclusion of the trial in the High Court, the plaintiffs claimed that the evidence they adduced showed, in particular, that:

(a) the set-up of TNBT was designed so that there would be total control by the defendant;

(b) the managing director of TNBT was the vice-president of the defendant;

(c) TNBT had no funds of its own and was dependent on the defendant;

(d) TNBT operated from within the defendant's building;

(e) TNBT did not have its own employees.

[15] The defendant on the other hand contended that the evidence led showed otherwise. The evidence showed that:

(a) TNBT operated as a subsidiary with duties and functions of its own and had an entity separate from the defendant;

(b) TNBT had its own procedures and approval chain;

(c) the sharing of employees and resources such as audit and legal services of the defendant by TNBT was a common feature of conglomerates and, in this case, of government-linked companies; but this did not make the defendant and TNBT one and the same entity;

(d) TNBT's lack of own funds was known to the plaintiffs as the financial records of TNBT had shown that it operated on the basis of reimbursable operating costs from the defendant, but evidence showed that payments to the plaintiffs were made by TNBT itself, not the defendant and this indicated the separation between TNBT and the defendant;

(e) while there were instances when the Managing Director of TNBT signed off letters using his designation at the defendant, he had explained this sufficiently.

Finding And Decision Of The Learned High Court Judge

[16] The learned High Court Judge found that the defendant and TNBT were operating essentially as one entity. TNBT, according to the learned High Court Judge could not have had a meaningful functional existence but for the financial resources and personnel support from the defendant.

[17] The learned High Court Judge also found that this was a case where special circumstances existed in a situation where there existed "inequitable or unconscionable conduct amounting to fraud in equity", although not actual fraud. Lifting the corporate veil would, in His Lordship's view, be consistent with the principles stated in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355.

[18] The learned High Court Judge also found that it was inequitable and unconscionable for the defendant to have collapsed back the business of TNBT and left TNBT as an "empty shell without funds and without any meaningful personnel".

[19] The learned High Court Judge found that in 2003, the defendant had resolved to deal with the legal, contractual and financial commitments to third parties upon such collapsing back but had failed to take steps in this direction.

[20] His Lordship found the conduct of the defendant in denying liability when TNBT's liability had been firmly established to be evidence of bad faith.

[21] The plaintiffs' claim for the payment of the arbitral award was therefore allowed by the High Court.

[22] The defendant appealed to this court against that decision of the High Court.

In The Court Of Appeal

[23] From our examination of the record of appeal and the submissions before us, we were of the view that the issues before us were:

(a) what was the applicable law at the material point in time which would permit the corporate veil to be lifted/pierced?

(b) in the circumstances of this case, was the corporate veil lifted or pierced in accordance with that applicable law?

The Applicable Law

Defendant's Submissions

[24] Learned counsel for the defendant submitted before us that the principle enunciated in *Adams v. Cape* [1990] Ch 433 and as adopted by our Court of Appeal in *Law Kam Loy v. Boltex (supra)* was the applicable law at the material time. In both cases, the courts did not accept that as a matter of law "the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group, merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law".

[25] Learned counsel for the defendant also referred to the case of *VTB Capital Plc v. Nutritek International Corp and Others* [2012] 2 BCLC 437. In that case the plaintiff sought to make two companies and one individual (the new defendants) jointly liable together with an existing defendant (a company known as RAP) on a contract to which the new defendants were not parties. The plaintiff claimed that RAP was in fact controlled by the new defendants who had used RAP as a vehicle to enter into agreements by making

fraudulent use of the company structure of RAP to conceal the wrongdoings of the new defendants. The Court of Appeal in that case held (citing *Adams v. Cape*, among other cases) that there was only one situation that would justify the court looking behind a company's corporate façade, and that was where the company was a mere façade concealing true facts. The Court of Appeal also held that the principles set out by Munby J in *Ben Hashem v. Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR on the circumstances which warrant the lifting of the corporate veil were correct.

[26] That decision of the Court of Appeal was upheld by the Supreme Court. Lord Neuberger stated (quoting Munby J in *Ben Hashem*'s case) that "it is necessary to show both controls of the company by the wrongdoer(s) and impropriety, that is mis(use) of the company by them as a device or façade to conceal their wrongdoing … at the time of the relevant transaction(s)".

[27] In *Ben Hashem*'s case, Munby J set out the following principles culled from various cases cited in that case:

(a) ownership and control of a company are not of themselves sufficient to justify piercing the veil;

(b) the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice;

(c) the corporate veil can be pierced only if there is some 'impropriety';

(d) the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety; the impropriety must be linked to the use of the company structure to avoid or conceal liability;

(e) if the court is to pierce the veil it is necessary to show both controls of the company by the wrongdoer(s) and impropriety, that is (mis)use of the company by them as a device or façade to conceal their wrongdoing;

(f) a company can be a façade even though it was not originally incorporated with any deceptive intent; the question is whether it is being used as a façade at the time of the relevant transaction(s).

[28] Counsel for the defendant submitted that the principles of "functional integrality" and "interests of justice" were no longer the applicable principles of law in determining whether the corporate veil should be lifted.

Plaintiffs' Submissions

[29] Counsel for the plaintiffs cited the Federal Court case of *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 where Chong Siew Fai CJ (Sabah & Sarawak) said:

A ... the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus in cases where there are signs personalities of companies being used to enable persons to evade their contractual obligations or duties, the Court would disregard the notional
B separateness of companies.

[30] The plaintiff also relied on the Supreme Court decision in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109, in which it was held that:

C It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities is well-established in company law, in recent years the court has, in a number of cases, bypassed this principle if not made an inroad into it. The Court seems quite willing to lift "the veil of incorporation" (so the expression goes) when justice of the case so
D demands.

... Professor Gower in his *Principles of Modern Company Law*, 3rd Edition, Page 213 said that courts:

> are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the
E group.

[31] The case of *Yap Sing Hock & Anor v. PP* [1993] 1 BLJ 35 was also referred to by learned counsel for the plaintiffs, specifically to the statement of Peh Swee Chin SCJ, at p. 43 of the report. In the course of His Lordship's discussion as to whether the veil of incorporation should/could be lifted in
F criminal cases, His Lordship said:

All cases for which the Courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against the third parties or outsiders to the companies in question who have or would have suffered damages but for the lifting of such veil. In each of those
G cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc.

[32] Learned counsel for the plaintiffs submitted that the learned High Court Judge was correct when his Lordship followed the Court of Appeal decision in the case of *Epic Quest Sdn Bhd & Anor v. Sheila Eleanor De Costa*
H [2011] 8 CLJ 518. In that case, the Court of Appeal upheld the High Court's decision to lift the corporate veil of three subsidiary companies as the court found that the subsidiary companies had ignored the separate corporate personalities of companies in the group and operated as one single enterprise in their dealings. The court held that it would be inequitable or
I unconscionable to allow the three companies to insist that they were separate legal entities for the purposes of liability to pay the respondent's bill. The Court further held that "And as pointed out in *Law Kam Loy*, unconscionable or inequitable conduct amounts to fraud in equity".

Analysis And Findings

[33] Apart from the authorities cited by the parties, this court had also in *Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal* [2013] 2 CLJ 734 held (relying, *inter alia*, on *Law Kam Loy v. Boltex* and *Adams v. Cape*) that in order to lift the corporate veil, actual fraud or some conduct amounting to fraud in equity must be pleaded or made out in evidence. (This decision was affirmed by the Federal Court a few months after we delivered our decision in the present appeal before us)

[34] We had read very carefully the authorities cited before us. We did not think that there was any material contradictions in the principles set out in those authorities on the lifting of the corporate veil.

[35] We had also carefully read the decision of this court in the *Epic Quest* case. In that case, the court had referred to *Law Kam Loy*'s case and said:

> … the appellants and SP Lim had themselves ignored the separate corporate personalities of the companies in the group, and operated as one group enterprise when dealing with the respondent. In the circumstances it would be inequitable or unconscionable to allow the appellants to now insist that they and the three companies are separate legal entities for the purposes of liability to pay the respondent's bills. And as pointed out in *Law Kam Loy*, unconscionable or equitable conduct amounts to fraud in equity.

[36] With respect, we did not think that this court in *Law Kam Loy* stated that unconscionable or equitable conduct amounted to fraud in equity. What this court in *Law Kam Loy* stated was that the special circumstances to which Lord Keith in *Adams v. Cape* referred "include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity". In other words, inequitable or unconscionable conduct *per se* would not be fraud in equity. It must be of such degree that it amounted to fraud in equity.

[37] Having examined the authorities cited before us, we were of the considered view that the principles of law on the lifting of the corporate veil as set out in those authorities could be distilled into the following:

(a) the corporate veil could be lifted/pierced in exceptional circumstances; and

(b) those exceptional circumstances must involve:

  (i) actual or equitable fraud; and

  (ii) the use of the company whose corporate veil was to be lifted as the means to conceal the true facts behind the façade of the company.

Was The Corporate Veil Correctly Lifted In This Case?

Defendant's Submissions

[38] Before us, the defendant submitted that from the outset, the plaintiffs knew that they were entering into the five agreements with TNBT and not the defendant.

[39] The defendant pointed out to the evidence of PW4 who agreed that for the second, fourth and fifth agreements the defendant did not give its approval. In other words, TNBT acted on its own.

[40] TNBT was not formed for the purpose of entering into the agreements with the plaintiffs. It was formed long before the agreements were entered into by the plaintiffs with TNBT.

[41] The plaintiffs knew all along that TNBT had no asset or funds of its own. While the invoices were issued to the defendant's chief accountant in accordance with the procedure set by the defendant, it was TNBT who acknowledged receipt of all the invoices and paid the amounts claimed using funds that originated from the defendant.

[42] Despite the fact that the defendant had made announcements in 2001 to Bursa Malaysia on its proposal to "collapse back" the subsidiaries (thus showing that there was no secrecy involved in the proposal), the defendant's board of directors only approved the "collapsing back" in 2003.

[43] The collapsing back took place long before the final award was handed down in October 2007. Implicit in this submission was that the "collapsing back" was not related to the final award.

Plaintiffs' Submissions

[44] Counsel for the plaintiffs urged us to find the learned trial judge had made correct findings of facts:

(a) TNBT was under the full control of the defendant through the provision of funds, premises and personnel and the legal structures put in place by the defendant;

(b) The Managing Director of TNBT was the Vice-President of the transmission division of the defendant, sitting at the same desk, in the same premises;

(c) TNBT and the defendant were operating as basically one entity.

[45] Counsel for the plaintiffs submitted that it was not their case that the corporate veil should be lifted "in the interests of justice" or based on economic entity. The plaintiffs' position was that the TNBT and the defendant were one and the same entity.

[46] Counsel for the plaintiffs submitted that it was unconscionable to hide behind the corporate veil.

Analysis And Findings

Actual fraud

[47] Learned High Court Judge in his judgment made the following findings of fact:

> ... I must say the facts **do not show this case to be one where TNBT was used as a front or a façade from the outset. Nor is it a case where actual fraud existed on the part of TNB and TNBT from the outset**. To this extent, I agree with Mr. Lazar's argument that the Plaintiffs knew fully well who they were dealing with, and the Agreements were prepared by their own solicitors. According to the Defendant, the Plaintiffs took a commercial risk when they dealt with TNBT; they should have extracted, say, a corporate guarantee from TNB to protect their legal position, but they did not. Further, it was not wrong for TNB to organise its corporate affairs in the way that it did, by incorporating TNBT as a special business enterprise whereas previously it was a division of TNB. TNBT is now a dormant company, its business having been collapsed back; ie, integrated back as a division of TNB. No doubt the collapsing back is generally part of a legitimate corporate exercise, but the critical question to ask, in my opinion, is whether this corporate exercise can be done in the full circumstances of this case in total disregard of the interest of the Plaintiffs, who have been previously paid the rentals through funds supplied by TNB but routed through TNBT. (emphasis added)

[48] We have ourselves examined the evidence, oral and documentary.

[49] In our considered view, the evidence was crystal clear that TNBT, which was formed long before the agreements were entered into, was not formed as a means to conceal the true facts in order to avoid contractual liability. The plaintiffs knew very well the true nature of TNBT and its mode of operations.

[50] In our view, even if there was no "collapsing back", there was always a danger that TNBT could be wound up and, being a company with no assets of its own, TNBT would be in no position to make any payments to the plaintiffs or any other creditor. The plaintiffs knew this full well.

[51] The agreements were pure commercial transactions between the parties, unlike the situation in the *Hotel Jayapuri*'s case. The plaintiffs had solicitors advising them and the first of the agreements was in fact drawn up by their solicitors.

[52] The defendant's audit committee paper prepared for the meeting on 11 August 2003 was an audit report on the agreements. The report showed that there was concern that the rate of RM6.80 per square foot per month charged by the plaintiffs was "exorbitantly higher" than the 1.40 per sq ft "charged by the multimodal transport operators in whose warehouse the equipment was earlier stored". Even the open yard charges were found to be quite high compared to the land value in the area at the material time.

[53] In our view, that part of the audit report showed that the payment terms in the agreements were more in the plaintiffs' favour rather than TNBT's (or even the defendant's). In such a case, it could not be said that TNBT had been used by the defendant as a façade to hide the true facts.

[54] We therefore agreed with the learned trial judge that there was no actual fraud involved in this case.

Equitable Fraud

The Pleadings

[55] In their statement of claim the plaintiffs sought to lift the corporate veil on two grounds:

(a) that the appellant had total control and management of TNBT or, alternatively, there was functional integrality between the appellant and TNBT such that the appellant and TNBT are one and the same;

(b) alternatively, that there was evidence "to show or infer that the defendant had committed fraud against the plaintiffs through the use of TNBT as the contracting vehicle for the agreements".

[56] The plaintiffs' pleaded case was thus clearly one of actual fraud.

[57] Counsel for the plaintiffs, however, submitted that when they included the submission on equitable fraud, learned counsel for the defendant at the High Court did not object and the learned High Court Judge dealt with the issue.

[58] According to counsel for the plaintiffs, so long as the facts were present, it would be sufficient to enable equitable fraud to be raised. The case of *Bousted Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 was cited in support

[59] We have closely examined *Bousted*'s case and were of the view that the context was rather different. In that case, the defendant was raising the issue of estoppel, which, as mandated by O. 18 rr. 7 and 8 of the Rules of the High Court 1980, must be specifically pleaded. The Federal Court in that case held that:

> In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term "estopped".

[60] Paragraphs 56 of the statement of claim was the only part of the statement of claim dealing with the alleged fraud by the defendant. That paragraph clearly referred to actual fraud only.

[61] We were unable to find any material facts that could form the basis of a plea of equitable fraud in the plaintiffs' reply to the amended defence.

[62] In light of the learned judge's finding and our own finding that there was no actual fraud, the learned trial judge had, in our considered view, erred in lifting the corporate veil on the ground of "inequitable or unconscionable conduct amounting to fraud" when that was not the pleaded case of the plaintiffs.

Was The Collapsing Back An "Inequitable Or Unconscionable Conduct"?

[63] The learned trial judge, while finding that the collapsing back of TNBT's business to the defendant was part of a legitimate corporate exercise, nevertheless concluded that TNBT and the defendant were operating basically as one entity and as such there would be inequity if the court refused to lift the corporate veil.

[64] The learned trial judge found that this was a case where special circumstances exist, in that there was "inequitable or unconscionable conduct amounting to fraud in equity". His Lordship stated that "here we have a situation where is *(sic)* being deprived by unjustifiable means of something to which he is entitled". That "inequitable or unconscionable conduct" was the collapsing back of the business of TNBT to the parent company (the defendant) despite the defendant being aware of TNBT's commitments to third parties.

[65] For the sake of completeness we had also considered whether, based on the evidence, the "collapsing back" of TNBT was such an inequitable or unconscionable conduct that it amounted to fraud in equity.

[66] While the "collapsing back" in fact only materialised after the dispute began, the evidence showed that the proposal to "collapse back" some of the defendant's subsidiaries, including TNBT, was already known to the public in December 2001, before the second agreement was entered into. The plaintiffs should have known of the proposal. Yet they entered into the second, third, fourth and fifth agreements without bothering to secure a corporate guarantee from the defendant.

[67] TNBT continued to exist as a company. It was a company without its own assets or funds at the time the agreements were signed. After the "collapsing back" of its business, it was still a company without its own assets or funds. We were unable to discern how the "collapsing back" could be said to be "inequitable or unconscionable conduct".

Decision

[68] We were satisfied, based on the applicable law, the plaintiffs' own pleadings and the evidence adduced, that there was no basis for the corporate veil to be lifted in this case.

[69] We therefore allowed the appeal with costs, and set aside the order of the High Court.

A **[70]** In light of that decision, the plaintiffs' cross-appeal on the issue of interest had become academic, and was therefore dismissed.

[71] We fixed costs at RM200,000, here and below, to be paid to the appellant.

B **[72]** As the judgement sum had already been paid into the joint account of the stakeholders, we made the ancillary order that such judgment sum be refunded to the appellant within two weeks from the date of our ancillary order.

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